

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 17, 2001 Session

STATE OF TENNESSEE v. EDWARD A. SCHLEGEL, III

Appeal from the Criminal Court for Sumner County
No. 81-2000 Jane W. Wheatcraft, Judge

No. M2000-02520-CCA-R3-CD - Filed September 7, 2001

The defendant, Edward A. Schlegel, III, pled guilty to two counts of theft over \$1,000.00, Class D felonies. See Tenn. Code Ann. §§ 39-14-103, -105. The plea agreement provided for concurrent four-year sentences on each count with 12 months to be served in the local jail and the remainder in the Community Corrections program. As a condition of Community Corrections, the defendant would also be jointly and severally liable to the victim for \$3,863.10 in restitution. At the sentencing hearing, the trial court ordered the defendant to pay an additional \$2,500.00 in "special damages," half of the estimated cost to install a security fence at the victim's business location. In this appeal of right, the defendant contends that the trial court erred by ordering him to pay restitution in an amount different from that stated in the plea agreement. The sentences for theft are vacated and the cause is remanded.

Tenn. R. App. P. 3; Judgments of the Trial Court Affirmed in Part and Reversed and Remanded in Part.

GARY R. WADE, P.J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JOHN EVERETT WILLIAMS, JJ., joined.

David A. Doyle, District Public Defender, Gallatin, Tennessee, for the appellant, Edward A. Schlegel, III.

Paul G. Summers, Attorney General & Reporter; Thomas E. Williams, III, Assistant Attorney General; and Sallie Wade Brown, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On the morning of December 5, 1999, Ted Bransford, who owns Precision Castings of Tennessee in Gallatin, noticed a large tub of aluminum material missing from his loading docks. After conducting an inventory, Bransford determined that more than 9,000 pounds of metal alloy, valued at \$13,657.50, had been stolen. He reported the theft to the Gallatin Police Department and

began to contact salvage yards in hopes of recovering the stolen material. A day or so later, Bransford located the stolen materials at Steiner-Liff Iron and Metal Works¹ in Nashville. He was able to identify the metal alloys from Precision Castings' stamp. A week after the first theft, police received another report of missing property from Precision Castings. This time, some 4,000 pounds of metal alloy, valued at more than \$12,000.00, had been stolen from his business.

During the course of the investigation, police learned that the defendant, Edward A. Schlegel, III, and his co-defendant, Israel Ritchey Gonzalez, who is the defendant's half-brother, sold the material stolen in the first theft to Steiner-Liff for \$1,823.97. Jimmy Collins, who worked at Steiner-Liff, informed police that while the defendant had claimed that the metals came from a business in Gallatin, he had asked for the check to be made payable to him personally. Police set up a surveillance of the defendant's residence in Gallatin and stopped his 1965 Chevrolet two-ton truck, which contained industrial-sized boxes of metal alloys in the back. The boxes found in the defendant's truck, which weighed several thousand pounds, were traced to the second theft at Precision Castings. Police arrested the defendant, who later confessed to his involvement in both crimes.

The Sumner County Grand Jury returned an indictment against the defendant and Gonzalez on two counts of theft over \$10,000.00, a Class C felony. See Tenn. Code Ann. §§ 39-14-103, -105. The plea agreement provided that the defendants would plead guilty to two counts of theft over \$1,000.00 and receive a concurrent four-year sentence on each count, with a 12-month jail maximum. The defendant and Gonzalez agreed to be jointly and severally liable for restitution in the amount of \$3,863.10.

At the sentencing hearing, Bransford testified that the cost of the metal alloys that police were unable to recover amounted to \$3,863.10. He also testified that he planned to spend approximately \$5,000.00 in order to install a security fence around the storage area and loading docks to prevent future theft.

The co-defendant Gonzalez, who had worked at Precision Castings through a temporary employment service, testified that the defendant had sought his help in stealing the material and claimed that he only participated in the first theft. On cross-examination, he acknowledged that he was on probation when he committed the theft and that he had been previously convicted of burglary, vandalism, and shoplifting.

The defendant, who had also worked at Precision Castings through a temporary employment service only a few weeks prior to the thefts, testified that he committed the crimes because he had been injured and was unable to work. He maintained that he was on the "bounds of living on the street" and that he had to support his family.

¹Also referred to as Phillips Metals Inc. in the record.

At the conclusion of the sentencing hearing, the trial court sentenced the defendant to 12 months in local jail with the remainder of his sentence to be served in Community Corrections. The trial court also ordered that, rather than being jointly and severally liable for the \$3,863.10 in restitution, the defendant pay two-thirds of that amount and pay an additional \$2,500.00 in "special damages," half of the estimated cost for the installation of a security fence around the victim's business.

Later, the defendant filed a motion asking the trial court to amend the sentence to reflect the terms of the original plea. The trial court granted the motion, ordering that the defendant be liable on a joint and several basis but also requiring the defendant to make the payment of \$2,500.00 for the installation of the security fence as a condition for Community Corrections. The trial court determined that the expense was part of the victim's pecuniary loss and compensable as special damages.

In this appeal, the defendant asserts that the trial court erred by imposing restitution in excess of that negotiated in the plea agreement. The defendant cites Rule 11(e)(4) of the Tennessee Rules of Criminal Procedure in support of his claim:

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if he or she persists in the guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

Rule 11(e)(1) of the Tennessee Rules of Criminal Procedure contemplates three different kinds of plea agreements in which the district attorney general may

- (A) move for dismissal of other charges; or
- (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
- (C) agree that a specific sentence is the appropriate disposition of the case.

In Goosby v. State, 917 S.W.2d 700 (Tenn. Crim. App. 1995), this court determined that an 11(e)(1)(B) plea allows a court to reject the terms of a plea agreement on the condition that the court advise the defendant in open court that should he or she persist in the guilty plea, the sentence imposed might be less favorable than that contemplated by the parties. Id. at 706. Once an 11(e)(1)(B) guilty plea is accepted by the court, it may not be withdrawn. Id. On the other hand, rejection of an 11(e)(1)(A) or (C) plea would allow the defendant to withdraw the guilty plea since it was conditioned upon a specific result. Id.

Here, the state and the defendant agreed to a specific sentence. At the submission hearing, the assistant district attorney general announced the terms of the plea agreement and the trial court explored at length whether the defendant understood the nature of the agreement. The trial court then concluded the hearing by announcing, "The guilty pleas are accepted by the Court" In our view, the record demonstrates that the state and the defendant consented to a specific sentence which was approved by the trial court. See Tenn. R. Crim. P. 11(e)(1)(C). That the trial court did not indicate any disapproval and did not afford the defendant an opportunity to withdraw the pleas lends credence to our determination that the nature of the agreement was binding.

Pursuant to 11(e)(1)(C), the trial court could have accepted the agreement under the terms announced or rejected it and "afford[ed] the defendant the opportunity to then withdraw the plea." See Tenn. R. Crim. P. 11(e)(1)(C). Here, the trial court accepted the plea agreement at the submission hearing, then altered the agreement at the sentencing hearing without affording the defendant an opportunity to withdraw his pleas.

The state concedes that the trial court erred, and also submits that the cost of installing a security fence is not cognizable as a "pecuniary loss" for restitution purposes.

Restitution is authorized as among several sentencing alternatives. Tenn. Code Ann. § 40-35-104(c)(2). Restitution may also be a condition of probation. Tenn. Code Ann. § 40-35-304. The statutory guidelines provide that where restitution may be proper, the presentence report is to include "documentation regarding the nature and amount of the victim's pecuniary loss." Tenn. Code Ann. § 40-35-304(b). Payments may be made in installments but the time for performance may not extend beyond the statutory maximum term of probation that could have been imposed. Tenn. Code Ann. § 40-35-304(c). Ability to pay is always a factor. Tenn. Code Ann. § 40-35-304(d). Pecuniary loss is defined as follows:

- (1) All special damages, but not general damages, as substantiated by evidence in the record or as agreed to by the defendant; and
- (2) Reasonable out-of-pocket expenses incurred by the victim resulting from the filing of charges or cooperating in the investigation and prosecution of the offense; provided, however, that payment of special prosecutors shall not be considered an out-of-pocket expense.

Tenn. Code Ann. § 40-35-304(e).

Webster's Third New International Dictionary, 596 (3d ed. 1993), defines damages as "the estimated reparation in money for detriment or injury sustained: compensation or satisfaction imposed by law for a wrong or injury caused by a violation of a legal right." Black's Law Dictionary, 396 (7th ed. 1999), defines "special damages" as "those alleged to have been sustained in the circumstances of a particular wrong." Black's defines "pecuniary loss" as "a loss of money or of something having monetary value." Id. at 957.

Here, the presentence report provided that the actual money loss to the victim, after recovery of the stolen goods, amounted to \$3,863.10. The victim requested restitution in that amount and the defendant agreed to be jointly and severally liable. The additional \$2,500.00, however, awarded as "special damages" for the victim's cost in installing a security fence, does not fall within the definition of "pecuniary loss." Because there was no security fence at the time of the offense and no damage requiring repair as a result of the thefts, the trial court lacked authority to order the additional restitution.

The sentences for theft are hereby vacated and the cause is remanded for the imposition of sentence in accordance with the terms of the plea agreement.

GARY R. WADE, PRESIDING JUDGE